UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

FERMIN CORTEZ, *et al*., and DAVID CHUOL, *et al*., on behalf of themselves and all others similarly situated, Plaintiffs, vs. NEBRASKA BEEF, LTD. and NEBRASKA BEEF, INC. Defendants.	Case No. 8:08-cv-00090 Case No. 8:08-cv-00099 **PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* REGARDING CITIZENSHIP OR IMMIGRATION STATUS OF PLAINTIFFS AND CLASS MEMBERS**

Plaintiffs respectfully move the Court to preclude Defendants' witnesses and defense counsel from testifying, referencing, arguing, questioning, commenting, inferring or submitting documentary evidence concerning the citizenship or immigration status of Plaintiffs and Class members.

I. INTRODUCTION

In their Omnibus Motion *In Limine* (Dkt. No. 331), specifically Motion *In Limine* No. 1, Plaintiffs seek to preclude Defendants from making any reference to Plaintiffs' and Class members' immigration status. The following brief offers supplemental authority for Plaintiffs' arguments that reference to such status is inadmissible because it is (1) irrelevant, (2) highly prejudicial to Plaintiffs and the Class, and (3) would mislead the jury.

II. ARGUMENT

A. Plaintiffs' and Class Members' Immigration Status Is Irrelevant to a Determination of Whether the FLSA and Corresponding Nebraska Statutes Have Been Violated

The immigration status of Plaintiffs and other Class members is irrelevant to these proceedings, and Defendants have made no credible argument to the contrary. Defendants assert that "given the nature of Plaintiffs' allegations, the evidence in this case may necessarily touch upon the fact that one or more of the class members is an immigrant." *See* Defendant's Brief in Support of Motion In Limine (Dkt. No. 225) at p. 4. However, the only example Defendants provide of such a scenario involves the assertion that immigration status is somehow relevant as to whether English is a second language for Plaintiffs or other Class members. *Id*. This argument should be afforded no weight, given that immigration status is clearly unrelated to whether an individual is proficient in speaking and/or reading English.

1. Undocumented employees are afforded the same protections under the FLSA as all other employees

The protections afforded employees under the FLSA extend to undocumented workers. For example, the 11th Circuit expressly held that the FLSA applies to undocumented workers because they fall under the FLSA's broad definition of an "employee" – any individual employed by an employer. *Patel v. Quality Inn South*, 846 F.2d 700, 701 (11th Cir. 1988). Many other courts have likewise concluded that the FLSA applies to undocumented workers. *See, e.g., In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987); *Donovan v. Burgett Greenhouses, Inc.*, 759 F.2d 1483, 1485 (10th Cir.1985); *Lopez v. Rodriguez*, 668 F.2d 1376, 1377-78 & n. 4 (D.C.Cir.1981); *see also Serrano v. Underground Utilities Corp.*, 970 A.2d 1054 (N.J.Super 2009). Defendants acknowledge that "some" courts have concluded that evidence regarding immigration

status is irrelevant for purposes of the FLSA. *See* Defendant's Brief Opposing Plaintiffs' Omnibus Motions *in Limine* (Dkt. No. 236) at p. 3 (citing to *Serrano v. Underground Utilities Corp.*, 970 A.2d 1054 (N.J.Super 2009)).

2. Defendants mischaracterized the cases cited in its opposition to Plaintiffs' Motions *In Limine*

Defendants mischaracterize the holdings of the cases cited in its brief. For example, Defendants cite to *Hoffman Plastics Compound v. NLRB* for the proposition that the NLRB could not award backpay to an "undocumented alien" who had been terminated in violation of the National Labor Relations Act. *See* Defendant's Brief Opposing Plaintiffs' Omnibus Motions *in Limine* (Dkt. No. 236) at p. 3. However, Defendants fail to mention that the back pay the court refused to award in *Hoffman* was for work that they "would have performed[,]" not for work *already* performed, as contemplated by the FLSA. *Hoffman Plastics Compound v. NLRB,* 535 U.S. 137, 160 (2002). The ruling in *Hoffman* is simply not relevant to an assessment of whether undocumented employees are entitled to the protections of the FLSA. *See, e.g., Flores v. Amigon,* 233 F. Supp. 2d 462 (E.D.N.Y. 2002) (holding Hoffman inapposite for actions under FLSA and New York Labor Law and barring discovery of immigration status in context of such actions); *Liu v. Donna Karan Intern., Inc.*, 207 F.Supp.2d 191, 192 (S.D.N.Y. 2002) (same).

Similarly, Defendants cite *Avila-Blum v Casa de Cambio Delgado, Inc*. for the proposition that immigration status may be raised at trial. *See* Defendant's Brief Opposing Plaintiff's Omnibus Motions *in Limine* (Dkt. No. 236) at p. 3. However, though the *Avila* court allowed testimony regarding potentially falsified employment records, the court ordered the defendant-employer to explore those issues "without opening broader collateral issues pertaining to Avila-Blum's immigration status." *Avila-*

Blum v Casa de Cambio Delgado, Inc., 236 F.R.D. 190, 192 (S.D.N.Y 2006).

Defendants find support for their erroneous argument by including only a portion of the following citation:

> Here, if Defendants possess any documentation supporting their assertion that Avila-Blum may have falsified employment records, or have a good faith basis substantiating such a belief, properly limited and narrowly tailored examination in deposition and at trial may be permissible without opening broader collateral issues pertaining to Avila-Blum's immigration status.

Id (emphasis added to portion of sentence that is not included in Defendants' citation).

B. Even If Evidence Regarding Plaintiffs' or Class Members' Immigration Status Were Relevant, Such Evidence Should Be Excluded Because It Would Be Highly Prejudicial to Plaintiffs and Would Mislead the Jury

Even if the Court were to determine that Plaintiffs' and Class members' immigration status is relevant to these proceedings, such evidence should nonetheless be excluded because it would be highly prejudicial to Plaintiffs. Under the Federal Rules of Evidence, even relevant evidence will nonetheless be excluded where the relevance of such evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See* Fed.R.Evid. 403. That is certainly the case here.

Immigration, particularly "illegal" immigration, is a highly charged and polarizing issue, particularly in parts of the country with large communities of undocumented immigrants. The intense feelings on both sides of the immigration debate are evidenced by the intense controversy surrounding the passage of Arizona's new immigrations laws. Furthermore, particularly in a down economy, it is not uncommon to hear blame placed on undocumented workers for loss or unavailability of jobs. These issues, coupled with the fear that "illegal" immigration will lead to acts of terrorism or

other crime, establish that any relevance immigration status might have to these proceedings is outweighed by the risk that the introduction of such evidence will prejudice the jury against Plaintiffs.[1]

Courts have recognized the potential for prejudice outweighs any probative value of evidence of immigration status. *See, e.g., Flores,* 233 F. Supp. 2d at 465 (in case brought under FLSA and New York Labor Law, holding, "[n]ot only does this Court find that the information is not relevant to Defendants' defense, but…even if it were, the potential for prejudice far outweighs whatever minimal probative value such information would have."). One court in the 8th Circuit also implicitly recognized the potential for plaintiffs to suffer prejudice and other consequences as a result of inquiries into their immigration status. The Minnesota District Court refused to compel plaintiffs in a sexual harassment case to answer questions at deposition regarding their use of multiple social security numbers, where the defendant-employer was asking for purposes of inquiring into their immigration status, even though the Court acknowledged that the employees' actions could impact their credibility. *Sandoval v. American Bldg. Maintenance Industries, Inc.*, 267 F.R.D. 257, 276 (D.Minn. 2007). The *Sandoval* court ultimately held that the "… minimal bearing that using multiple social security numbers may have on plaintiffs' credibility does not outweigh the chilling effect it would have on them as victims of sexual harassment from coming forward to assert their claims." *Id*. The Court further noted that, although the defendant-employer could question the plaintiffs

[1] Despite Defendants' opposition to Plaintiffs' Motion *in Limine* on the subject, Defendants filed a similar Motion *in Limine*, in which they seek to preclude testimony regarding an INS investigation at Defendants' plant and reference to "employee immigration status," "immigration investigations," and other similar terms because Defendants argue they are "irrelevant, highly prejudicial, and constitute[] impermissible character evidence." *See* Defendant's Brief in Support of Motion In Limine (Dkt. No. 225) at pp. 3-4. Defendants are clearly attempting to create a situation where they can offer evidence of immigration status to the jury when they so choose, but Plaintiffs are prevented from introducing evidence on the same topic that is beneficial to their case. This Court should prevent Defendants from doing so.

regarding any false names or aliases they may have used, it could not ask questions regarding why the plaintiffs engaged in such behavior, presumably because their immigration status would likely be implicated. *Id*. at 277.

Furthermore, the introduction of evidence regarding immigration status is likely to mislead the jury into believing that there is an unresolved issue with respect to whether undocumented workers can lawfully make a claim under the FLSA. For example, if the defense questions a witness regarding his or her immigration status, a juror could easily infer that the immigration status of Plaintiffs and Class members is somehow an element of the claims. As such, Defendants should be precluded from raising this issue at trial.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court preclude Defendants' witnesses and defense counsel from testifying, referencing, arguing, questioning, commenting, inferring or submitting documentary evidence concerning the citizenship or immigration status of Plaintiffs and Class members.

Respectfully submitted,

August 27, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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